No. 12922

In the United States Court of Appeals for the Ninth Circuit

WILLIAM C. McINDOE,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Oregon

BRIEF FOR THE APPELLEE

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United States Attorney.
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Assistant United States Attorney.

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JURISDICTION

The jurisdiction of the District Court is founded upon Section 617 of the National Service Life Insurance Act of 1940, as amended (Title 38, U.S.C.A., Section 817), which provides that, in the event of a disagreement as to a claim arising under a National Service Life Insurance contract, suit may be brought in the same manner and subject to the same conditions and limitations as are applicable to United States Government (converted) life insurance, under the provisions of Sections 445 and 551 of Title 38, U.S.C.A.

William C. McIndoe, plaintiff-appellant, brought this suit against the United States, defendant-appellee, on a $10,000 contract of National Service Life Insurance issued to his son, William C. McIndoe, Jr., during military service, claiming that the policy matured on the date of the insured's death, entitling him, as the beneficiary, to the proceeds thereof, and that a claim for the insurance, presented to the Veterans' Administration, had been denied, creating the necessary jurisdictional disagreement. The existence of a disagreement between the plaintiff and the defendant before suit was admitted, as were also the allegations with respect to the residence of the plaintiff and the issuance of the policy of National Service Life Insurance. (R. 4.)

The jurisdiction of this Court to entertain the appeal is likewise conferred by Section 617 of the National Service Life Insurance Act of 1940, as amended (Title 38, U.S.C.A.,

ec. 817), and Section 19 of the World War Veterans' Act Title 38, U.S.C.A., Sec. 445).

STATEMENT OF THE CASE

The question presented is whether the United States is stopped to interpose the defense of non-payment of monthly premiums in a suit on a National Service Life Insurance contract. The contract sued upon lapsed for non-payment of the premium due June 28, 1947, and was not in force on the date of the insured's death, which occurred August 24, 1947. Appellant contends, however, that the monthly premium due June 28, 1947, should be waived or the Government estopped to plead its non-payment, alleging in his complaint that "the defendant so misled the insured that the defendant is estopped to deny the payment of one monthly premium payment, to-wit: that payment due on or before July 29, 1947".

The undisputed facts, as set forth in a pre-trial order (R. 3-9), show that a $10,000 National Service Life Insurance policy was issued to William C. McIndoe, Jr., during military service, effective September 28, 1943, and was continued in force by the payment of premiums during the period of his military service through allotment of his service pay; that following his discharge from service, on April 26, 1946, premiums were either paid by direct remittance, or were waived, through May 28, 1947; that the

policy lapsed for non-payment of the premium due June 28, 1947, unless the United States is estopped to assert the defense of non-payment of premiums; and that the insured died August 24, 1947 (R. 4-6). The appellant, who was named as contingent beneficiary in the policy, succeeded the primary beneficiary, Mrs. Irena C. McIndoe, following her death, on August 12, 1948, and presented a claim for insurance to the Veterans' Administration, which was denied, upon the ground that the policy had lapsed for non-payment of the premium due June 28, 1947, and, therefore, was not in force on the date of the insured's death. (R. 4-5.)

Admitting that the premium due June 28, 1947, was not paid, appellant contended that, because of misleading information which the Veterans' Administration conveyed to the insured, by letter dated May 29, 1947, the insured was led to believe that there was a credit to his account, in the amount of $25.90, which was available to pay premiums; that this accounted for his failure to pay the premium due June 28, 1947; and that, because of this misleading information, the Government was estopped to assert the defense of non-payment of the July premium.

The agreed facts show that the insured addressed a letter to the Veterans' Administration Branch Office, at Seattle, Washington, on or about May 13, 1947, inquiring with respect to his National Service Life Insurance, as follows:

Gentlemen:

Inclosed is remittance in the amount of $6.50 in payment of the premium due for April on National Service N-14-769-414 on the life of William C. McIndoe, Jr., ASN 19201354.

As I was not able to make one or two payments on time I have gotten a few of my payments in late and now I am not sure for which month I am due for. I would appreciate it very much if you would let me know just where I stand. Thank you.

/s/ WILLIAM C. McINDOE, JR.,
Reed College,
Portland 2, Ore. (R. 8.)

The Veterans' Administration responded by letter dated May 29, 1947, reading as follows:

Dear Mr. McIndoe:

Reference is made to your correspondence regarding National Service Life Insurance.

The records indicate that premiums on your insurance have been paid as shown in column (3) below. If no remittance was tendered for the premium due on July 28, 1946, or within 31 days thereafter, the insurance lapsed.

(1) Certificate Number N 14 769 414.
(2) Monthly Premium $6.50.
(3) Premiums Paid Through 7-27-1946.
(4) Date of Lapse 7-28-1946.
(5) Credit $25.90.

Form 9-37, "Application for Reinstatement of National Service Life Insurance", is enclosed and

should be completed in accordance with instructions thereon. The credit shown under Column (5) above may be used for the amount required for reinstatement and the excess may be applied to later premium payments.

The remittance enclosed in your recent letter when identified with your account will also be held as a credit to your account.

Very truly yours,

D. O. NELSON,
Director, Insurance Service. (R. 8-9.)

The issue thus raised was tried before the Honorable Gus J. Solomon, District Judge, without a jury, on the 10th day of November, 1950, and, after briefs had been submitted, was resolved in the Government's favor, on February 17, 1951. (R. 89-92.) In rejecting appellant's claim that the United States was estopped, the court said:

> It is unnecessary to pass upon the question of whether the letter, together with the other evidence in the case, contains all the elements of an estoppel for the reason that I have come to the conclusion that the United States may not be estopped to assert any defense available to it on a policy of National Service Life Insurance because of any action of an employee of the Veterans Administration. (R. 89-90.)
>
> * * * * * * * *
>
> On the authority of the *Loveland* case and in view of the subsequent decisions which support the doctrine therein enunciated, I find that the United States is not estopped to raise the defense of non-payment of pre-

mium on a National Service Life Insurance policy and that a judgment in its favor should be entered. (R. 92.)

In his findings of fact, conclusions of law and judgment of dismissal, the court found that the insured died August 24, 1947; that the last monthly premium payment made on his insurance policy occurred on May 1, 1947, covering the premium due for the period from May 28, 1947, to June 27, 1947; that the National Service Life Insurance policy involved in the case provided for a 31-day grace period; and that the policy was in effect until July 29, 1947. (R. 10-11.) He concluded, as a matter of law, that the policy lapsed by reason of non-payment of monthly premiums when due prior to August 24, 1947, and was not in force on that date; and that the United States may not be estopped to raise the defense of non-payment of premiums on a National Service Life Insurance policy. (R. 11.) The suit was ordered dismissed on the merits, on March 16, 1951. (R. 12.) Notice of appeal was filed by the plaintiff on May 7, 1951. (R. 13.)

SUMMARY OF ARGUMENT

Under the terms of a National Service Life Insurance contract, which are found in the National Service Life Insurance Act, the amendments thereto, and the regulations promulgated pursuant to the authority contained in the Act, an insured is required to pay monthly premiums to

keep the insurance in force and is allowed a 31-day grace period for this purpose. If a monthly premium is not paid within the grace period, the policy ceases and expires, under the regulations. The insured failed to pay the monthly premium due June 28, 1947, within the 31day grace period, and insurance protection expired, so that the policy was in a state of lapse on the date of the insured's death, which occurred on August 24, 1947.

Appellant's claim that the United States is estopped to assert the defense of non-payment of the premium due June 28, 1947, because of misleading information furnished to the insured by the Veterans' Administration, was properly rejected by the trial court. The general principle is well settled that the United States is not bound by the laches or unauthorized acts of its agents, and this principle has been uniformly followed in the field of Government life insurance. Although unnecessary to a decision because the application of the general principle is decisive, the essential elements of an estoppel were not shown to exist.

ARGUMENT

The policy lapsed for non-payment of the premium due June 28, 1947, and was not in force on the date of the insured's death, which occurred on August 24, 1947. The Government is not estopped to assert the defense of non-payment of premiums.

Under the terms of the National Service Life Insurance

policy[1] the insured is allowed a 31-day grace period in which to pay monthly premiums, and if a monthly premium is not paid within this grace period, the policy ceases. Sections 10.3414, 10.3415 and 10.3416, Title 38, C. F. R., 1941 Supplement (Regulations & Procedure R-3414, 3415, 3416, Veterans' Administration) (Appendix, *infra*). Premiums must be paid in accordance with the policy provisions or the policy lapses. *Weiss* v. *United States,* 187 F. (2d) 610 (C.C.A. 2d).

Admittedly, the monthly premium due on this insur-

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[1] The National Service Life Insurance certificate, which was issued in each case in lieu of the policy, as authorized in Section 602 (o) (Title 38, U.S.C.A., Sec. 802 (o)), provided:

> Subject to the payment of the premiums required, this insurance is granted under the authority of the National Service Life Insurance Act of 1940, and subject in all respects to the provisions of such Act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for this insurance, and the terms and conditions published under authority of this Act, shall constitute the contract.

This form of Government insurance contract was recognized in *Lynch* v. *United States,* 292 U.S. 571, and in *White* v. *United States,* 270 U.S. 175. Specific authority to promulgate regulations under the National Service Life Insurance Act is contained in Section 608 (Title 38, U.S.C.A., Sec. 808).

ance contract on June 28, 1947, was not paid during the 31-day grace period allowed for that purpose. Protection expired upon the expiration of the 31-day grace period, and, as the insured's death did not occur until 24 days thereafter, on August 24, 1947, the trial court correctly concluded that the policy was not in force on the date of the insured's death.

The sole theory on which the appellant relies for recovery is that, notwithstanding the failure to pay the premium due June 28, 1947, the United States is estopped to assert the defense of non-payment of premiums because of misleading information contained in a letter dated May 29, 1947, addressed to the insured by a Branch Office of the Veterans' Administration. The trial court properly rejected this claim of estoppel because the principle is well settled that the United States is not bound by the laches or unauthorized acts of its agents, and that principle has been uniformly applied in cases involving Government life insurance. *Wilber National Bank* v. *United States,* 294 U.S. 120; *Federal Crop Ins. Corp.* v. *Merrill,* 332 U.S. 380; *United States* v. *Riggins,* 65 F. (2d) 750 (C.C.A. 9th); *Bank of Arizona* v. *United States,* 73 F. (2d) 811 (C.C.A. 9th); *James* v. *United States,* 185 F. (2d) 115 (C.C.A. 4th); *Weiss* v. *United States, supra; United States* v. *Fitch,* 185 F. (2d) 471 (C.C.A. 10th); *Niewiadomski* v. *United States,* 159 F. (2d) 683 (C.C.A. 6th), certiorari denied, 331 U.S. 850; *United States* v. *Loveland,* 25 F.

(2d) 447 (C.C.A. 3d); *United States v. Norton,* 77 F. (2d) 731 (C.C.A. 5th); *Coleman* v. *United States,* 100 F. (2d) 903 (C.C.A. 6th); *Roskos* v. *United States,* 130 F. (2d) 751 (C.C.A. 3d), certiorari denied, 317 U.S. 696.

This court had occasion to early apply the general rule in a war risk insurance suit in *United States* v. *Riggins, supra,* in which it was said (p. 751):

> We think the proposition that the government is bound by the knowledge of its officers and agents and by the contents of all its records cannot be maintained. We find no decision sustaining the view that the government is so bound, and none has been cited. In *Utah Power & Lt. Co.* v. *U. S.,* 243 U.S. 389, 409, 37 S. Ct. 387, 391, 61 L. Ed. 791, the Supreme Court stated the general rule:
>
> " * * * That the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. [Cases cited.]"

One of the most recent cases involving a National Service Life Insurance contract, in which the appellant made the same contention as made here—that the same rules with respect to estoppel which apply to an old line or commercial insurance company apply to National Service Life Insurance—was rejected by the United States Court of Appeals for the Fourth Circuit in *James* v. *United States, supra,* in which the court said (pp. 118-119):

Plaintiff's statement is generally true as to private life insurance companies that unreasonable delay by an insurer in approving or rejecting an application for reinstatement of a lapsed policy operates as a waiver of the insurer's right to assert facts which otherwise would permit him to deny the application. *Froehler* v. *N. American L. Ins. Co.,* 1940, 374 Ill. 17, 27 N.E. 2d 833; *Apostle* v. *Acacia Mutual L. Ins. Co.,* 1935, 208 N. C. 95, 179 S.E. 144; *Lechler* v. *Montana L. Ins. Co.,* 1921, 48 N. D. 644, 186 N.W. 271; *Rocky Mount Savings & Trust Co.* v. *Aetna L. Ins. Co.,* 1930, 199 N. C. 465, 154 S.E. 743. This general rule, however, does not apply when the United States, rather than a private company, is the insurer.

It is well settled that the United States is in a position different from that of private insurers and is not estopped by the laches or unauthorized acts of its agents. *Federal Crop Ins. Corp.* v. *Merill,* 1947, 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 10; *Wilber National Bank* v. *United States,* 1935, 294 U.S. 120, 55 S. Ct. 362, 79 L. Ed. 798; *United States* v. *Norton,* 5 Cir., 1935, 77 F. 2d 731; *United States* v. *Loveland,* 3 Cir., 1928, 25 F. 2d 447. But plaintiff argues that since he is seeking to base estoppel or waiver on an omission to act, rather than on a positive act of a government official in excess of his authority, he should receive different treatment. He draws an artificial distinction. * * *.

An attempt to invoke an estoppel, predicated upon the Veterans' Administration's delay in declaring and paying dividends on National Service Life Insurance, was disapproved by the United States Court of Appeals for the Sec-

ond Circuit in *Weiss* v. *United States, supra,* in which it was said (p. 612):

> The cases arising after World War I, and to date after the last war, seem quite clear that payments, including dividends, on veteran policies are to be only as the governing regulations provide and that the United States cannot be held estopped into other or greater payments. [Cases cited.] * * *.

A claim that the United States was estopped to deny the reinstatement of a National Service Life Insurance contract was rejected by the United States Court of Appeals for the Tenth Circuit in *United States* v. *Fitch, supra,* in which the court said (p. 473):

> The plaintiff attempts to overcome this deficiency by applying the rule of waiver or estoppel against the Administrator. This, of course, she cannot do for it is an established principle of law that the United States may not be estopped by the unauthorized acts of its agents nor may such agents waive the rights of the United States by their unauthorized acts. [Cases cited.] * * *.

A claim that the United States was estopped to deny that a beneficiary designated by the insured stood in loco parentis, as described by the insured in the application, was rejected by the United States Court of Appeals for the Sixth Circuit in *Niewiadomski* v. *United States, supra,* in which the court said (p. 688):

> It is not shown that any officer or agent of the

> United States misrepresented any fact to the insured. He knew the facts; they didn't. In any event, it appears well settled that in matters of this kind the United States is neither bound nor estopped by the acts of its officers and agents in entering into an agreement to do what the law does not permit. Government officers may not waive the provisions of the National Service Life Insurance Act. *Wilber National Bank of Oneonta, New York* v. *United States,* 294 U.S. 120, 123, 55 S. Ct. 362, 79 L. Ed. 798; *Coleman* v. *United States,* 6 Cir., 100 F. 2d 903, 905; *United States* v. *Valndza,* 6 Cir., 81 F. 2d 615, 617.

One of the earliest cases in which the principle was applied to a war risk insurance case, and on which the trial court relied, is *United States* v. *Loveland, supra,* in which the court said (p. 448):

> In the final analysis the act of omission by which the government is estopped, if at all, is the failure of the government's employees to reply to the letter of August 29th. We shall not quote the many authorities denying such effect to the omission of an officer of the government, but refer to them as collected in 22 Cyc. 1664C, where the concensus of them is thus stated. "The government is not responsible for the laches or wrongful act of its officers. It may be the loser by their negligence, but it never becomes bound to others for the consequences of such neglect, unless it be by express agreement to that effect." We have not overlooked the contention that the government, by entering into the insurance field and consenting to be sued, is thereby put in the same position as a contesting insurance company. But such conclusion does not follow.

What the power of agents of insurance companies may be to bind their companies is a question of no present moment. The question here involved is the power of servants of the United States to place liability upon it by an act of omission when they would be powerless so to do by an act of commission. The decisions holding that a servant of the government has, in the absence of statutory warrant and duty, no such power, are too firmly settled and so providently wise as to forbid our holding that, when the government broadened its field of operation to new fields, it thereby broadened the power of those it employed in such new fields to the extent of allowing them, by acts of neglect or omission, to commit the government to liabilities in such field which they had no power to do in other spheres of government activity. * * *.

In *United States* v. *Norton, supra,* a case which, like the present one, involved a lapse for failure to make timely payment of premiums, the United States Court of Appeals for the Fifth Circuit applied this same principle, stating (p. 732):

> Usually, the United States cannot be estopped by any acts of her agents. The government could not be estopped to contest the policy by the mere fact that the April and May premiums were not returned. The Veterans' Bureau was entitled to have the beneficiary, who had actually paid them, execute the receipt requested and it did nothing that could have led the insured to believe his policy was in force or to prejudice the beneficiary so as to work an estoppel. *Wilber National Bank* v. *United States,* 294 U.S. 120, 55 S. Ct. 362, 79 L. Ed. ——.

This same general principle was applied by this court in *Bank of Arizona* v. *United States, supra,* involving a war risk insurance contract, in which the court said (p. 812):

> The action of the officers of the Veterans' Bureau in allowing and paying a claim for war risk insurance to the mother was in violation of the law and is not binding on the government. [Cases cited.]

As stated by the Supreme Court in *Federal Crop Ins. Corp.* v. *Merrill, supra:*

> * * * "And so we assume that recovery could be had against a private insurance company. But the corporation is not a private insurance company. It is too late in the day to urge that the government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business heretofore conducted by private enterprise or engages in competition with private ventures."

Appellant's argument that, in fairness and justice, the ordinary rules of estoppel should be applied, because the Government is acting in a proprietary capacity in engaging in the life insurance business, fails to take into consideration the fact that the United States, in granting National Service Life Insurance, was not engaging in the life insurance business for profit or gain, but was performing one of its Governmental functions in providing insurance protection otherwise not obtainable for veterans serving with the armed forces and their dependents. Actually, the Government,

nder the statute, bore the costs of administration (Section 06 (Title 38, U.S.C.A., Sec. 806)), and the costs of ex-ess mortality and premium waiver for disability due to he extra hazards of war (Section 607 (a) (Title 38, J.S.C.A., Sec. 807 (a)). Manifestly, these costs were con-iderable and called for large appropriations by the Con-gress. In the words of Mr. Justice Holmes, in *White* v. *Jnited States,* 270 U.S. 175, the Government's relation to he insureds, "if not paternal, was at least avuncular".

That the National Service Life Insurance program is vithin the sphere of Governmental activity under the Con-titution was decided by the Supreme Court in *Wissner* v. *Wissner,* 338 U.S. 655, rehearing denied, 339 U.S. 926, vhere the contention had been advanced that the National Service Life Insurance Act, insofar as it was in conflict with he community property laws of the State of California, vas unconstitutional. The Court said:

> The constitutionality of the Congressional mandate above expounded need not detain us long. Certainly Congress in its desire to afford as much material protection as possible to its fighting force could wisely provide a plan of insurance coverage. Possession of Government insurance, payable to the relative of his choice, might well directly enhance the morale of the serviceman. The exemption provision is his guarantee of the complete and full performance of the contract to the exclusion of conflicting claims. The end is a legitimate one within the Congressional powers over National defense, and the means are adapted to the

chosen end. The Act is valid. *McCulloch* v. *Maryland,* 4 Wheat. 316, 421 (1819). * * *

Although the trial court did not think it necessary to pass upon the question as to whether the evidence relied upon by the appellant contained all the elements of an estoppel, because of his conclusion that the United States was not estopped to assert any defense available to it on a policy of National Service Life Insurance (R. 89), and we share his view that his ruling on the question of estoppel was decisive, a brief reference to the evidence shows that the elements of an estoppel were not present. The letter of May 29, 1947, did not contain information which would reasonably warrant the insured to believe that there was a credit to his account which could have been used to pay a premium falling due on June 28, 1947, without a reinstatement or any other action on his part. It did not purport to be a statement of his insurance account as of May, 1947, but, instead, expressly referred to his account as of July 27, 1946, one year earlier. It contained the information that if the premium due July 28, 1946, had not been paid within the 31-day grace period, the insurance had lapsed, and that, in such event, there was a credit of $25.90 to his account which could be used to reinstate and the excess applied to later payments. The credit was available only in the event the insurance had lapsed in July, 1946, and then for the purpose of reinstatement or future payments, an application being enclosed for that purpose. The insured did not re-

instate or request that the credit be applied to the payment of any particular premiums. That he was aware of the conditions of the contract calling for premium payments is shown by the record of premium payments which he made by remittances after his discharge from the service (R. 5), as well as the letter of May 13, 1947, enclosing the April premium. He had also received receipts for the premium payments which he had made. (R. 87-88.) In the light of these facts, it is difficult to perceive how he could have concluded that there was a credit in 1947 which could be applied to the June 1947 premium. In any event, he was chargeable with knowledge of the terms and conditions of the insurance contract requiring premium payments within the 31-day grace period to avoid lapse, for, as pointed out in *Wilber National Bank* v. *United States, supra:*

> The statutes and regulations which govern the War Risk Insurance Bureau, we must assume, are known by those who deal with it. * * *.

Under the circumstances, it appears that a basis for an estoppel was lacking. Cf. *Wilber National Bank* v. *United States, supra.*

CONCLUSION

For the reasons mentioned, it is respectfully submitted that the judgment of dismissal was proper and should be affirmed.

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Attorney, Department of Justice.

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AUGUST, 1951.

APPENDIX

Sections 10.3414, 10.3415 and 10.3416, Title 38, C. F. R., 1941 Supplement (R. & P. R-3414, 3415, 3416, Veterans' Administration), provide as follows:

3414. ESTABLISHMENT OF GRACE PERIOD.—For the payment of any premium under a National Service Life Insurance policy, a grace period of 31 days without interest will be allowed, during which time the policy will remain in force; but if the policy shall mature within the grace period, the unpaid premium or premiums shall be deducted from the amount of insurance payable. (October 8, 1940)

3415. COMPUTATION OF GRACE PERIOD.—For the purpose of determining whether a premium tendered on National Service Life Insurance shall be accepted and a regular receipt issued therefor, the grace period for the payment of the premium shall be computed so as to include 31 days from and after the date on which the premium was due. But if the last day of the grace period falls on Sunday or a legal holiday the premium will be accepted if tendered on the next following business day. The postmark date will govern the date on which the premium was tendered. The monthly premium when paid within the grace period shall be deemed to carry such insurance in force for the month for which the premium was due. If a premium is not paid prior to the expiration of the grace period, the effective date of the lapse shall be the due date of the premium in default. (October 8, 1940)

3416. LAPSE FOR NONPAYMENT OF PREMIUM.—If any premium be not paid when due, the

National Service Life Insurance policy shall cease and become void, except as otherwise provided in the policy. (October 8, 1940)